First Principles.

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FBI LEGISLATION

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In The News

May 10, 1976 In a supplement to its Final Report on Intelligence Operations, the Senate Intelligence Committee disclosed that the National Security Agency has maintained files on at least 75,000 American citizens. According to the report, the files contained sensitive personal information gathered from the agency's monitoring of communications, reports from other intelligence agencies, and newspaper clippings. The files were kept until 1974, when they were destroyed because NSA explained later "their usefulness did not justify the costs in time and money and storage space." Other disclosures revealed that the NSA still picks up the international messages of many Americans and that the NSA had conducted at least eight break-ins in the late 1950's and early 1960s to plant bugging devices.

May 12, 1976 The Deputy Attorney General Harold R. Tyler announced that the Justice Department will not defend two FBI agents who are defendants in a civil lawsuit filed by the Socialist Workers Party arising from the burglaries of the SWP's New York City offices — 92 known FBI burglaries of the SWP and affiliated organizations occurred on the average of once every three weeks from 1960 to 1966. Tyler reportedly felt that it would involve a conflict of interest for the Justice Department to defend an activity that might eventually bring criminal prosecution in separate cases. (5/12/76, *New York Times*, p. 10)

May 13, 1976 In response to evidence of a "special relationship" between newswoman Jacque Srouji of the *Nashville Tennessean* and the FBI, publisher John Siegenthaler warned fellow publishers and editors that "FBI news sources may in fact be a two way conduit through which the bureau may seek to raise questions about the internal affairs of newspapers and the politics and ideologies of the people who work for them." Testimony before the Subcommittee on Energy and Environment of the House Small Business Committee has indicated that Srouji had access to "highly sensitive documents" from the FBI investigation concerning the death of Karen Silkwood, the nuclear technician who raised questions about the safety of the plutonium facility in which she worked. The Subcommittee has begun to focus on Ms. Srouji's extensive access to FBI files, her motives for contacting the subcommittee and the apparent parallel between this affair and the FBI's Cointelpro program under which public figures such as Martin Luther King were discredited. (5/15/76, *New York Times*)

May 13, 1976 The Center for National Security Studies released CIA documents related to foreign assassinations and made available through a Freedom of Information Act lawsuit sponsored by the American Civil Liberties Union. The documents earlier had been given to the Rockefeller Commission and the Senate Intelligence Committee. (*Washington Post*, 5/14/76, p. A23)

June 3, 1976 In a letter to Senate leadership, Director of Central Intelligence Bush announced that his agency would resume the destruction of administrative records and "records which were subject to investigation by the Rockefeller Commission and the Select [Church] Committee." Destruction had been halted during the Rockefeller and congressional investigations. The destruction of many of the CIA files is necessary, Bush claimed, in order to comply with the Privacy Act of 1974. (*New York Times*, 6/4/76)

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

In The Literature

Congressional Publications

Foreign and Military Intelligence, Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities, U.S. Senate, Book IV, April 23, 1976, Report No. 94-755, $1.90. The Senate Select Committee's 95 page history of the CIA.

Hearings on S. Res 400 to Establish a Standing Committee of the Senate on Intelligence Activities and For Other Purposes, Senate Committee on Rules and Administration, March 31; April 1, 2 and 5, 1976, #69-450-0.

Report and Recommendations of the Committee on the Judiciary to Accompany S. Res. 400 to Establish a Standing Committee of the Senate on Intelligence Activities, Senate Committee on Rules and Administration, April 29, 1976, #57-006-0. The rules Committee proposes an intelligence "oversight" panel without legislative or authorizing jurisdiction.

Articles

"The Jennifer Triangle," by Marilyn Booth, *Harvard Political Review*, Spring, 1976, pp. 17-25. An extensive accounting of the CIA's failed Glomar Explorer spy venture, the attempts at cover up, the role of the press in the affair, and the complicated web of corporate-CIA intrigue, and the several lawsuits growing out of the Glomar-Jennifer affair (see In The Courts, *Military Audit Project v. Bush*) are discussed as well.

"A Bill to Bug Aliens," by Christopher H. Pyle, *The Nation*, May 29, 1976, pp. 645-648. This analysis of the wiretap "reform" legislation proposed jointly by Attorney General Levi and Senator Kennedy (S.3197), is critical of the bill's lack of Fourth Amendment safeguards. Instead of toughening the requirements for electronic surveillance, the legislation actually leaves open the possibility of discretionary executive wiretaps, looser warrant requirements, and political harassment of foreign visitors.

Books

COINTELPRO: The FBI's Secret War on Political Freedom, by Nelson Blackstock (Vintage: New York, July 2, 1976). Illegal operations against dissidents — a revision and update of earlier version published by Monad Press last November.

In The Congress

May 19, 1976 The Senate, after 15 months of investigation into the abuses of the nation's intelligence agencies, voted 72 to 22 to establish a permanent select Committee on Intelligence with authority to oversee the CIA, FBI, and other intelligence agencies. One of the conclusions of the Senate Select Committee on Intelligence was that Congress had exercised too little control over the intelligence agencies. This new oversight committee would have exclusive authority to oversee the activities of the CIA and to authorize funds for that agency. The new committee would share budget and legislative authority over the other intelligence agencies, including the intelligence division of the FBI, with existing committees. (5/20/76, *New York Times*, p. 1)

May 20, 1976 Senate leaders named the 15 members of the newly created permanent Senate Committee on Intelligence Activities. Majority Leader Mike Mansfield announced the eight Democrats who will serve: Daniel K. Inouye (Hawaii), Birch Bayh (Ind.), Adlai E. Stevenson (Ill.), William D. Hathaway (Maine), Walter Huddleston (Ky.), Joe Biden, Jr. (Del.), Robert B. Morgan (N.C.), and Gary W. Hart (Colo.). Minority Leader Hugh Scott named the Republican members: Clifford P. Case (N.J.), Mark O. Hatfield (Ore.), Barry Goldwater (Ariz.), Howard H. Baker, Jr. (Tenn.), Robert T. Stafford (Vt.), Strom Thurmond (S.C.), and Jake Garn (Utah). It is expected that Senator Inouye will become chairman, and Senator Baker vice-chairman.

In The Courts

April 14, 1976 *Weissman v. CIA*, Civil Action No. 75-1583 (D.D.C.) Clarification of order granting defendants motion for summary judgment. Defendant sought access under the FOIA to files compiled by CIA *"in the course of a security investigation . . . to assess the security risk of offering him a position as a foreign intelligence operative in two overseas missions."* These investigations were conducted without plaintiff's knowledge. The withholding of 54 documents in whole or in part was upheld on the basis of affidavits justifying withholding under exemptions (b)(1), (b)(3), (b)(6) and (b)(7). Notably, the court found that Section 403(d)(3), (relating to sources and methods) is a statute authorizing withholding, and that the (b)(7) exemption for investigating records compiled for law enforcement purposes applies to these CIA files.

April 30, 1976 *Halkin v. Helms*, Civ. Action No. 75-1773 (D.D.C.). In an ACLU class action suit arising from the interception of overseas cable traffic by the National Security Agency, the government moved for dismissal on grounds that it could not confirm or deny the interception of cable traffic of specific individuals. A formal claim of privilege was filed by the Secretary of Defense.

(continued on page 14)

The Case for a Legislated FBI Charter

JERRY J. BERMAN*

No more important business is before the Congress than to enact a comprehensive legislative charter to govern the FBI. At issue is the rule of law and the future of constitutional democracy.

The need for a comprehensive FBI Charter is beyond debate; before the FBI can be made to obey the law, it must have a rule of law to obey. Because the present statutes are silent concerning the investigative responsibilities of the FBI in "intelligence" investigations aimed at American citizens[1] Congress has allowed the executive branch to conduct intelligence operations as a matter of executive discretion and the FBI's intelligence mission has been authorized and expanded.

This is not law but license. Rule by executive order, subject to modification at any moment, has placed our liberties on anything but a firm foundation. Allowing the executive branch to claim an "inherent power" to direct FBI intelligence has led to widespread abuse.[2] Only a legislative charter can put to rest the doctrine of inherent power and place *all* of the investigative activities of the FBI within a framework of positive law. After forty years of executive disorder, only public covenants can begin to restore public trust in our investigatory agencies. The new Domestic Security Guidelines which Attorney General Levi promulgated in April of this year are a case in point.[3] They may be more restrictive than previous executive directives, but they have been established under questionable authority[4] and can be changed tomorrow or by the next Attorney General.

Congress must no longer defer to the Executive. It must enact a Charter that sets forth precisely under what circumstances and to what extent the Bureau may investigate the political activities of American citizens. And this raises a basic question that must be answered during these deliberations: Should Congress authorize, limit, or prohibit domestic intelligence investigations?

While there is growing support for a legislated Charter to define the investigative jurisdiction of the FBI, there is no general agreement on how Congress should resolve this vital issue:

- The FBI and the Justice Department want the Congress to authorize domestic security investi-

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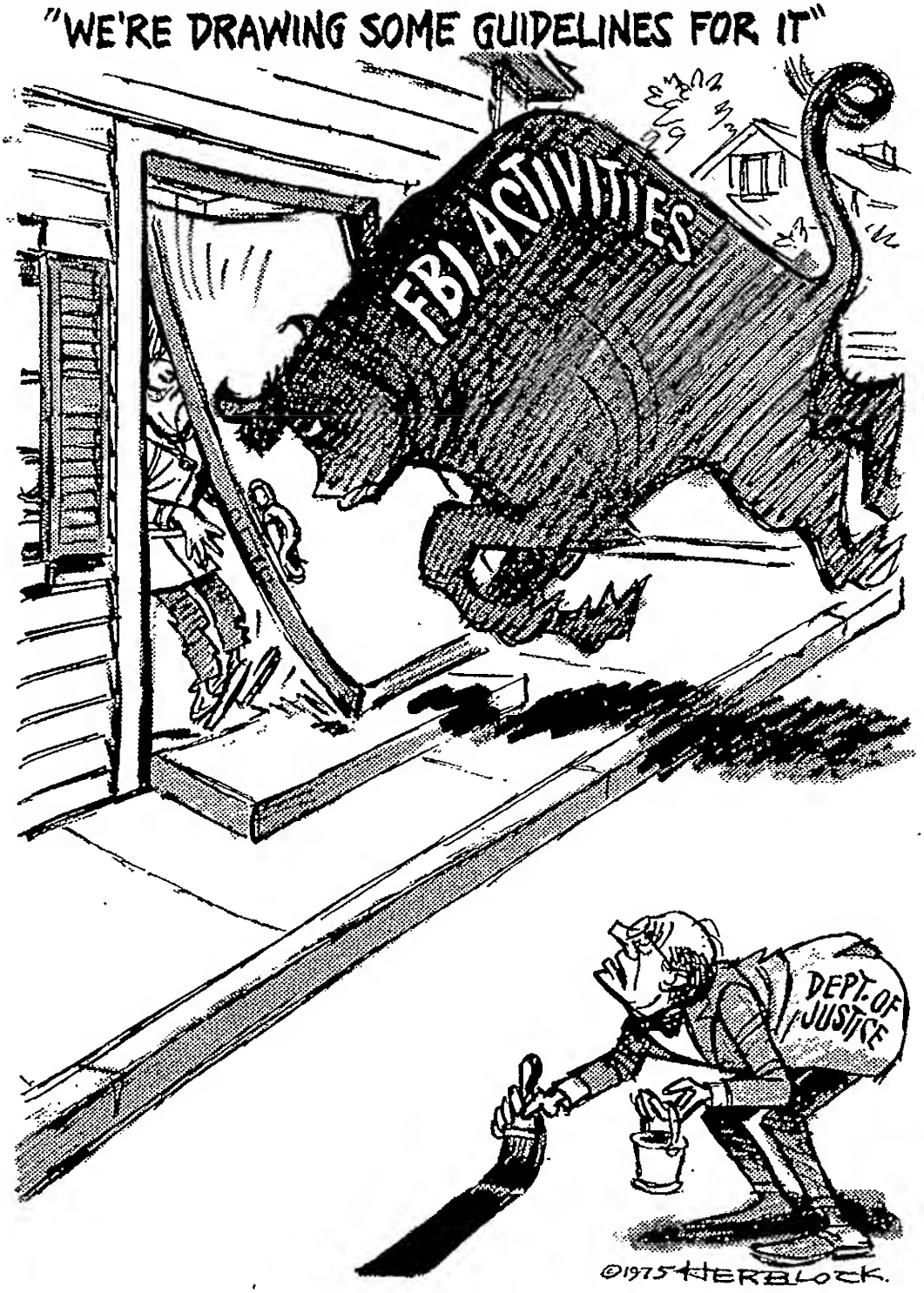
1. See primarily 28 U.S.C. 533, the basic investigatory authority of the FBI.

2. For the most broad interpretation of the President's inherent power, see Testimony of Former Assistant Attorney General William Rehnquist in "Federal Data Banks and Constitutional Rights", a study prepared by the staff of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93rd Congress, 2d Session (Committee Print: 1974), pp. 598-604.

3. Justice Department Guidelines on Domestic Security Investigations and Reporting on Civil Disorders and Demonstrations Involving a Federal Interest, as released to the press on March 10, 1976. (Hereinafter The Justice Department Guidelines)

4. The Attorney General claims authority to issue intelligence guidelines under a subsection of 28 U.S.C. 533, which provides that the FBI may conduct "such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." See Attorney General Edward H. Levi, Address to the American Bar Association, August 13, 1975. The question, however, is in reality whether intelligence investigations are "official matters" under the control of the Attorney General. No other statute provides such explicit authority, unless the section of this same statute which authorizes the FBI to "detect" crimes is read to cover intelligence matters. Such a reading would mean that the FBI and the Justice Department can put all Americans under surveillance "to detect" crimes.



gations.[5]

• The Senate Select Committee on Intelligence has made a series of recommendations that, if adopted, would limit but not curtail intelligence investigations.[6]

• The House Intelligence Committee has called for prohibition by recommending the abolition of the Internal Security Branch of the FBI.[7]

• My own opinion, and one that has been endorsed by a number of public interest organizations,[8] is that the FBI should be prohibited from conducting domestic intelligence investigations targeted at American citizens. Today, I would like to explain why I have reached this conclusion.

Limiting FBI Investigations to Crime

Under the First Amendment, it is the duty of Congress to devise a legal structure for the FBI that will curtail FBI intelligence activities in order to avoid a repetition of the past; it is incumbant on Congress to make no law "abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Congress can only accomplish this by enacting a Charter that prohibits all domestic intelligence investigations by the FBI, and specifically limits the FBI to initiating investigations only to "detect . . . . and prosecute crimes against the United States."[9] There is no other limitation on the FBI that can guarantee our constitutional liberties and democratic values.

The record of FBI intelligence activities over the last 40 years leads to the inescapable conclusion that our country does not need and can no longer afford to permit the FBI to engage in ongoing intelligence investigations targeted at those who are not actually criminal suspects. Moreover, there is no reason why FBI criminal investigations of illegal *acts* will not take care of our real security interests.

By definition, intelligence investigations are initiated without reasonable cause to believe a crime has been committed to gather information on the plans, activities, beliefs, associations and memberships of individuals and groups. Such investigations intrude on speech and associational privacy protected by the First, Fourth, Fifth, and Ninth Amendments to the Constitution. They "chill speech" by the fear of investigation, exposure, and reprisal for engaging in controversial political activity.[10]

Intelligence Investigations: Illegal Government Programs

Acting under Executive Orders to investigate "subversive activities"[11] and "prevent violence",[12] the FBI has not confined its investigations to individuals or groups engaged in illegal conduct. It has investigated members of Congress, peace groups, civil rights organizations, the women's liberation movement, and delegates to political conventions. It has routinely initiated and conducted investigations and maintained files on nearly one million associates and members of organizations that espouse revolutionary doctrine but whose activities have posed no clear and present danger to the security of the country.[13] And it has engaged in a long list of illegal operations[14]:

• FBI "black bag jobs" or illegal burglaries carried out against hundreds of citizens and groups;

• FBI mail opening programs conducted in contravention of statutes and postal regulations; and mail opening programs, also illegal, conducted in cooperation with the CIA, eventually resulting in the opening of 13,000 letters annually;

5. The Attorney General and the Director of the FBI have articulated this position in innumerable statements. The latest will suffice: See Testimony of Attorney General Edward H. Levi before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, February 11, 1976; and the Statement of Clarence M. Kelley, Director of the FBI, before the same Subcommittee on February 11, 1976.

6. See Recommendation 44 in "Intelligence Activities and the Rights of Americans", Book II of the *Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities*, United States Senate, 94th Congress, 2d Session, Report No. 94-755 (Government Printing Office: April 26, 1976). (Hereinafter Senate Final Report)

7. Recommendations of the House Committee on Intelligence, February 11, 1976, House Report 94-833.

8. See Letter To Senate Intelligence Committee on FBI Charter Recommendations from the American Civil Liberties Union, Americans for Democratic Action, Center for National Security Studies, Committee for Public Justice, Common Cause, and United Automobile Workers, March 11, 1976.

9. 18 U.S.C. 533.

10. A line of cases develops these propositions, e.g., *NAACP v. Alabama*, 357 U.S. 499 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960).

11. See Executive Directives first issued by President Roosevelt orally in 1936 and by way of a press release in 1939; reissued in 1943 by the Justice Department; in 1950 by the Justice Department; and in 1952 by President Truman. See also, discussion in Senate Final Report, note 6 supra, pp. 25-28.

12. I refer particularly to the order issued by Attorney General Ramsey Clark in 1967 to gather intelligence relative to civil disorders: Memorandum from Attorney General Ramsey Clark to J. Edgar Hoover, Director FBI, September 14, 1967. See also discussion in Senate Final Report, note 6 supra, pp. 82-84.

13. Senate Final Report, note 6 supra, p. 6.

14. See generally Senate Final Report, note 6 supra. See also, Jerry J. Berman and Morton H. Halperin, eds., *The Abuses of the Intelligence Agencies*, (Center for National Security Studies: 1975) pp. 14-50.

• FBI COINTELPRO operations conducted to "disrupt or otherwise neutralize" political groups: 2,411 actions that included harassment, dissemination of derogatory information from investigative files, dissemination of false and anonymous materials to breed dissension among groups, agents provocateur and interference in the political and judicial process;

• FBI "smear campaigns" against such civil rights leaders as Dr. Martin Luther King, Jr. involving illegal wiretapping, dissemination of derogatory information and an anonymous letter urging King to commit suicide;

• FBI programs of warrantless wiretapping dating back to 1940, directed at citizens and groups in the United States;

• FBI political intelligence programs conducted at the request of the Executive to keep Presidents informed about their "enemies" and opponents (usually persons who have done no more than dissent from Administration policy).

This public record of abuse places a heavy burden of proof upon the Executive to show that it is both legitimate and necessary to allow the FBI to continue intelligence investigations aimed at American citizens. Given the intrusions into individual and associational privacy that are inherent in intelligence gathering, this burden of proof is a difficult one to substantiate.

Intelligence Investigations: Are They Needed to Stop Violence and Terror?

This problem of legitimacy and necessity relates directly to the debate over the future role of FBI intelligence. The Justice Department and the FBI are seeking authorization to conduct intelligence investigations in order to anticipate and prevent violence; to justify the continuing need for FBI intelligence investigations,[15] they cite statistics which show that acts of violence and terrorism are on the rise in the United States. In its Final Report, the Senate Select Committee also recommends that the FBI should be authorized to conduct limited intelligence investigations to prevent violence and terror.[16]

Two assumptions underlie these recommendations: (1) that intelligence investigations in fact play a useful role in anticipating and preventing violence; and (2) that carefully drawn guidelines together with executive and congressional oversight can prevent serious abuse.[17] These assumptions are simply not supported by the evidence on the public record. The facts lead to the conclusion that this grant of authority is both unwarranted and dangerous.

Violence and terrorism do pose a danger to our society and we must find ways to reduce violence in our society. But intelligence investigations do not provide a meaningful solution to this problem and may in fact exacerbate it.

First, the public record demonstrates that FBI intelligence has been all but useless in anticipating or preventing acts of violence:

• According to the Senate Select Committee, between 1960 and 1974 the FBI conducted over 500,000 separate investigations of persons and groups under the "subversive" category, predicated on the possibility that they might be likely to overthrow the government of the United States. Yet *not a single individual or group* has been prosecuted since 1957 under the laws which prohibit planning or advocating action to overthrow the government and which are the main alleged statutory basis for such FBI investigations.[18]

• According to the GAO audit of FBI intelligence investigations, the Bureau has not been able to use its vast intelligence operations to anticipate violence. "Investigations of sabotage, certain bombings, and riot violations, and protection of foreign officials, although handled as part of the FBI's domestic intelligence operations, *usually involved criminal acts committed before the investigations were initiated.*"[19]

• In fact, the FBI rarely anticipates significant activity of any kind, including violent acts. According to the GAO audit of 19,700 cases, involving a random sample of 898 cases in 10 FBI field offices, the FBI anticipated activity in only 17 cases. Only 6 cases involved potential violence.[20]

15. See Statement of Clarence Kelley, Director, FBI, before the Civil Rights and Constitutional Rights Subcommittee of the House Judiciary Committee, February 11, 1976.

16. Recommendation 44, and discussion in Senate Final Report, note 6 supra, pp. 318-323.

17. Senate Final Report, note 6 supra.

18. Senate Final Report, note 6 supra, p. 19.

19. Comptroller General of the United States, *Report to the House Committee on the Judiciary, FBI Domestic Intelligence Operations . . . Their Purpose and Scope: Issues That Need to be Resolved* (General Accounting Office: February 24, 1976), pp. 3-4. (Hereinafter cited as GAO Report)

20. GAO Report, pp. 140-144. In reviewing 101 organization files, the GAO found only 119 instances where activities were anticipated by the FBI. Only 12% of these activities could conceivably involve violence. There is no record of whether the FBI prevented any of this potential violence. The FBI contends that these statistics may be unfair because they concentrate on investigations of individuals rather than groups (GAO Report, Appendix V). In response, GAO states that its "sample of organizations and control files were sufficient to determine that generally the FBI did not report advance knowledge of planned violence." In most of the 14 instances where such advance knowledge was obtained, it related to "such activities as speeches, demonstrations or meetings — all essentially non-violent." (GAO Report, p. 144).

• One of the main reasons advanced for expanded collection of information about urban unrest and anti-war protest was to help responsible officials cope with possible violence. However, as the Senate Committee reports, a "former White House official with major duties in this area under the Johnson administration has concluded, in retrospect that 'in none of these situations . . . would advance intelligence about dissident groups [have] been of much help,' and that what was needed was 'physical intelligence' about geography of major cities, and that the attempt to 'predict violence' was not a 'successful undertaking.'"[21]

• Much FBI information is useless to other agencies dealing with violent political acts. The GAO report notes that, while the FBI disseminates over 89% of its intelligence case reports to the Secret Service, the agency retains only 6% of the information received. The Secret Service said it received "too much not always useful information."[22] And a specific Defense Department Directive, DoD Directive 5200.27, requires the destruction of a great deal of information it receives from the FBI about civilians considered "threatening" to the military, including reports on civilian subversion.[23]

• While citing acts of violence and terrorism as a justification for intelligence activities, it is common knowledge that the FBI did not anticipate any of them. The civil disorders of the 1960's, the Capitol bombing, the political assassinations and attempts, the activities of the SLA, and other instances, were not anticipated and obviously not prevented by FBI intelligence gathering.[24]

This record not only undercuts the FBI's case for conducting intelligence investigations in order to anticipate and prevent violence, but documents why intelligence investigations are all but useless for this purpose. First, the FBI collects "facts", but we do not know what facts are relevant in predicting violence. Second, intelligence agencies depend on prior notice, yet most political violence is spontaneous. As three presidential commissions have concluded, "the larger outbreaks of violence in the ghettos and on the campuses were most often spontaneous reactions to events in a climate of social tension and upheaval."[25] Third, the FBI assumes there is a causal connection between "speech" and "action," but as random bombings demonstrate, terrorists do not follow rational patterns. And finally, the FBI relies on a network of established informants for information, but true terrorists know this and operate underground. Under these circumstances, massive intelligence coverage is relatively useless, and unless we adopt the unacceptable alternative of putting everyone under surveillance, it will continue to be. The problem must be addressed differently.

Intelligence Investigations: A Threat to Political Rights

The Justice Department Guidelines and the Senate Committee recommendations, which are supposed to limit the FBI, actually authorize continuing intelligence investigations of lawful political activity. They pose a grave risk to our civil liberties.

To allow the FBI to anticipate violence, the Justice Department Guidelines authorize the FBI to initiate an investigation against an individual or individuals on the basis of a mere allegation that they are engaging or will at some time engage in violence to achieve political ends. Within ninety days, if the FBI finds "specific and articulable facts" to indicate that such persons "may be" engaging in activities that will involve violence at some time in the future, a full scale investigation may be conducted until "all leads are exhausted."[26]

At no point do the Justice Department Guidelines specify what kinds of facts justify investigation. Earlier drafts mentioned advocacy, membership, and support of groups that engage or may engage in "violent" political activities. Later drafts state that the FBI must look to facts that indicate a "likelihood" that an individual or group will resort to violence, but do not specify what this means.[27] Past practice is instructive, and the FBI has always interpreted such authorizations to mean that it should conduct anticipatory, ongoing, and perhaps never-ending investigations of the members of organizations who espouse "revolutionary" doctrine; of those who associate with such organizations, even though they may only attend meetings or receive literature; of those who offer support to

21. Senate Final Report, note 6 supra, p. 19. Testimony of Joseph Califano.

22. GAO Report, note 18 supra, pp. 125-126.

23. Senate Final Report, note 6 supra, p. 254.

24. See the examples cited by Director Kelley in his statement of February 11, 1976, cited in note 14 supra and in his Memorandum to the Comptroller, GAO Report, note 18 supra, pp. 212-217.

25. Senate Final Report, note 6 supra, p. 68. See *Report of the National Commission on Civil Disorders* (1968), chapter 2; *Report of the National Commission on the Causes and Prevention of Violence* (1969); *Report of the President's Commission on Campus Unrest* (1970).

26. The latest guidelines were issued on March 10, 1976. Although the guidelines state the purpose of investigations as ascertaining "information on the activities of individuals, or individuals acting in concert which involve or will involve the use of force or violence and the violation of federal law," the "involve or will involve" standard is diluted by following sections which authorize the FBI to initiate preliminary investigations on the basis of mere "allegations" and full investigations if persons or groups "may be" engaged in activities that involve or will involve violence. The Attorney General admitted that a more "flexible" standard was required to explain the choice of "may be" over "are involved." See Testimony cited in note 5 supra.

27. I refer to earlier drafts of the guidelines issued in November and December of 1975.

such groups, even if it is only support of their right to association; and of those non-revolutionary organizations who might be infiltrated or co-opted. It is clear from past FBI conduct that the effect of such guidelines would be to permit the Bureau to inhibit the right to dissent publicly on matters of program and policy.

To anticipate violence, the FBI would be authorized to investigate the same individuals and groups it has always investigated. As the Comptroller General has stated, "the language in the draft guidelines would not cause any substantial change in the number and type of domestic intelligence investigations initiated."[28] (In 1974, according to Senate documents, there were over 30,000 ongoing intelligence investigations.[29]) As the Senate Select Committee Final Report points out, intelligence officials inside the FBI interpret the Guidelines to authorize continuing investigations of "subversives".[30]

If these Guidelines had been in effect in the 1960's, the Bureau could have justified most if not all of the investigations that have since been discredited: all anti-war groups, including the American Friends Service Committee and Women's Strike for Peace, because anti-war demonstrators might resort to violence; all members and associates of the Communist Party, because it advocates the violent overthrow of the government; employees of the Institute for Policy Studies because of the suspicion that they were in contact with the violent Weatherpeople; and all civil rights organizations, including the Southern Christian Leadership Conference, because civil rights protesters interfered with interstate commerce to influence public policy. The newest guidelines require that there be "substantial" interference, but can FBI agents be expected to draw the line between substantial and trivial interference?

The Senate Select Committee also provides standards for the conduct of preventive intelligence investigations. The Committee adopts the framework of the Justice Department Guidelines but attempts to make its rules stricter, to prevent the Bureau from investigating lawful political activities. The Committee has not really succeeded, and it expressed its own frustrations at trying to draft language that maintains the "fine line" between surveillance of lawful activity and violent conduct.[31] That frustration is warranted, because that line cannot be drawn. There is no way around the fact that, by definition, intelligence investigations are not based on criminal conduct and unavoidably lead to investigation of lawful activity.

Under the Church Committee's proposed standards, the FBI may conduct a preliminary preventive intelligence investigation for as long as ninety days "when it has specific allegation or substantiated information that an American will soon engage in terrorist activity."[32] But there is no real difference between this standard and that proposed by the Justice Department. What, for example, is the difference between an "allegation" and a "specific allegation"? Or between "likelihood" and "soon"? Or between "violence" and "terrorist activity"? As Senator Philip Hart (D-Mich.) points out in his additional comments at the end of the Final Report,

> *The Recommendation would preclude mere advocacy or association as a predicate for investigating Americans. In practice, however, that would simply require specific allegations that an unpopular dissident group was planning terrorist activity.*[33]

Senator Hart points out the problem with examples:

> *Of course, if the FBI receives a tip that John Jones may resort to bombing to protest American involvement in Vietnam, the Bureau should not be forced to sit on its hands until the blast. But our proposals would permit more than review of federal and local records on John Jones and interviews of his associates, even in a preliminary investigation. On the basis of an anonymous letter, with no supporting information — let alone any indication of the source's reliability — the FBI could conduct secret physical surveillance and ask existing informants about him for up to three months, with the Attorney General's approval.*
>
> *The Committee was concerned about authorizing such extensive investigations before there is even a "reasonable basis of suspicion" the subject will engage in terrorism. The Report offers examples of how this recommendation would work, and indicates our desire to insulate lawful political activity from investigation of violent terrorism. But these very examples illustrate how inextricably the two may be at the outset of an inquiry into an allegation or ambiguous information. The task of finding out whether a dissident is contemplating violence or is only involved in vigorous protest inevitably requires investigation of his protest activities. In the process, the FBI could follow the or-*

28. GAO Report, note 18 supra, p. 150.

29. Hearings before the Select Committee to Study Governmental Operations With Respect to Intelligence Activities of the United States Senate, 94th Congress, 1st Session, Volume 6, Federal Bureau of Investigation (Government Printing Office: 1976), pp. 349-350 (Exhibits 3 and 4).

30. Senate Final Report, note 6 supra, p. 318.

31. Senate Final Report, note 6 supra, p. 321.

32. Senate Final Report, note 6 supra, p. 320 (Recommendation 44).

33. Senate Final Report, note 6 supra, p. 360.

ganizers of a Washington peace rally for three months on the basis of an allegation they might also engage in violence.[34]

The Senate Committee opens the intelligence door further by proposing that the FBI be allowed to conduct a full preventive intelligence investigation if there is "reasonable suspicion" that an American "will soon engage in terrorist activity."[35] In effect, any factual basis beyond allegation (such as a meeting at which violent acts are discussed) can trigger an investigation that can continue for a year or longer if the Attorney General finds "compelling circumstances."[36] But there is no definition of "compelling circumstances" and the standard of "soon will engage in" begins to have that indefiniteness that would allow the Bureau to investigate any possibility of future violence. This standard invites a repetition of long-term surveillance of lawful political activity, and a resort to familiar covert techniques such as informer plants and inspection of bank records, tax returns, trash covers, and the like. Under the Senate's recommendations, all may be employed in a full investigation.[37]

The Senate effort demonstrates that the issue can be resolved only by prohibition of intelligence investigations. Even to rely on more narrowly drawn standards ignores the central lesson of the recent investigations. As the Senate Committee itself observed,

We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence, or identifying foreign spies, were expanded to what witnesses characterized as 'vacuum cleaners', sweeping in information about lawful activities of American citizens.[38]

It is the nature of intelligence investigations to grow beyond their intended limits, especially in times of controversy, turmoil, or crisis.

Deterring Violence and Not Political Activity

The problem of political violence must be addressed differently. The Justice Department and the FBI continue to engage Congress in a dialogue over how to control FBI intelligence activities, but they have failed either to justify these activities with a convincing argument that legitimate security interests cannot be protected by conducting criminal investigations limited to gathering evidence rather than "information," and aimed at prosecution and conviction rather than "prevention of violence."

Instead of employing 1000 agents and 1000 informers[39] in the apparently fruitless exercise of identifying ahead of time the lone assassin or persons "likely" to engage in political violence, the FBI should concentrate its efforts on *deterrence.* This can only be accomplished by finding and prosecuting those who have committed violent crimes — and not only the politically violent. Out of over 1900 bombings in 1975, only 89 were attributed to political terrorists; violence is a police problem and not an intelligence problem.[40]

This approach would lead the FBI to focus on conduct rather than advocacy. It would limit the FBI to the collection of evidence instead of "all information" about the plans, activities, and beliefs of political groups. By making successful prosecution the goal, the FBI would refrain from employing illegal techniques such as warrantless wiretapping that could "taint" important evidence.

This is the only way to solve the problem of violence without sacrificing our civil liberties and democratic values. Certainly before we authorize the government to conduct intelligence investigations aimed at anticipating violence, we need to know more about the causes of violence and whether such intelligence in fact serves a useful purpose in preventing violence. And although the record before Congress is a strong case for absolute prohibition of non-criminal investigations, a further study of the issue is in order. A commission should be created to study terrorism and how to combat it without sacrificing democratic values. Among its other duties, a new commission would be required to study political violence from a broader perspective than the commissions set up to study the civil disorders and campus outbreaks during the 1960's. It should explore in depth whether — and under what circumstances — the intelligence agencies can play a useful role in anticipating or preventing violence. It should also explore the relationship between police tactics and the occurrence of violence; using agents provocateur and COINTELPRO tactics, the FBI carried out violent action in order to "prevent" violence. Perhaps the commission might conclude that an intelligence agency, being prone to mount its own covert operations, is not a proper agency to investigate terrorist acts. Perhaps a new agency is necessary that works on different assumptions than those of the intelligence community.

While this study is conducted, Congress should

34. Senate Final Report, note 6 supra, pp. 360-361.
35. Senate Final Report, note 6 supra, p. 320 (Recommendation 44).
36. Senate Final Report, note 6 supra, p. 320 (Recommendation 44).
37. Senate Final Report, note 6 supra, pp. 328-329 (Recommendations 55-59).
38. Senate Final Report, note 6 supra, pp. 3-4.
39. GAO Report, note 18 supra, pp. 132 and 135.
40. Senate Final Report, note 6 supra, p. 20 (fn. 112).

make it clear that the FBI should be operated as a criminal investigatory agency. By Charter, it should establish that in the future the FBI may initiate an investigation only on the basis of Fourth Amendment standards — showing "specific and articulable" facts giving it reason to believe that an individual or individuals acting in concert are engaged in or are imminently likely to engage in a specific criminal act in violation of federal law.[41]

To insure that the FBI will investigate only specific, punishable acts, I also recommend — as does the Senate Committee[42] — the repeal or the revision to conform to constitutional standards of Sections 2383-2386 of Title 18. As written, these speech "crimes" serve no other purpose than to authorize the FBI to investigate the speech, membership, and associational activities of persons and groups under the pretext of conducting criminal investigations. Although there have been no prosecutions or convictions under these statutes for two decades and the Supreme Court has construed them narrowly to prohibit only "imminent lawless action" involving violence[43], the FBI routinely relies on these statutes as a basis for investigation and uses them as a justification for prying into protected activities.[44] Furthermore, the Justice Department's Guidelines make these activities the basis for preliminary investigations. By repealing these statutes — and rejecting all guidelines for collecting intelligence rather than evidence — Congress should make it clear that the FBI cannot and must not investigate conduct which the government cannot punish.

A criminal standard should also apply to all forms of possible espionage engaged in by American citizens. The Senate Select Committee's recommendations would authorize the FBI to conduct preliminary and full preventive intelligence investigations against Americans who "may soon engage in . . . hostile foreign intelligence activities."[45] Again, an allegation that an American is conspiring with a hostile foreign power is sufficient to trigger an intelligence investigation, even if the potential "espionage" is not criminal under law. Intelligence investigations on this pretext have led to massive surveillance of the lawful activities of citizens; based on mere allegations, Operation CHAOS, the FBI-CIA mail opening program, and NSA's communications intercept programs were operated to determine whether anti-war activists were supported by hostile foreign powers. A "reasonable suspicion" standard, established by Congress, would prevent such investigations. And, by making the forms of espionage that are now defined as "clandestine intelligence activities" specific violations of law, Congress would make it clear that the FBI only investigates crimes.

Finally, proposals to allow the FBI to engage in so-called "preventive" action should be rejected. FBI agents already have the power to warn potential victims, to arrest, to obtain a judicial warrant to search for or seize dangerous contraband such as bombs or weapons. New authority can only serve to legalize conduct which is currently beyond the law, including the techniques the FBI used in its COINTELPRO operations. Now that the Attorney General has expressed similar reservations with respect to preventive action, Congress has even more reason to prohibit such activity and to focus its deliberations instead on specific recommendations to outlaw COINTELPRO techniques.[46]

The Case for Fundamental Reforms

There is a clear need for fundamental change in the FBI, yet the Guidelines and Senate Recommendations as drafted will not alter Bureau jurisdiction or practice, nor can stricter guidelines be expected to accomplish this. When we speak about FBI intelligence, we are really referring to a large bureaucracy which has developed an intelligence mentality. For nearly forty years it was under the sole direction of J. Edgar Hoover, and agents have

41. See *Terry v. Ohio*, 392 U.S. 1 (1968). "Reasonable suspicion" means specific and articulable facts which taken together with rational inferences from those facts give rise to a reasonable suspicion that specified activity has occurred, is occurring, or is about to occur.

42. Senate Final Report, note 6 supra, p. 339 (Recommendation 93): Smith Act and Voorhis Act.

43. *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in which the Court held that political groups are within their legal rights to advocate any course of action including the "use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

44. GAO Report, note 18 supra, pp. 28-31.

45. Senate Final Report, note 6 supra, p. 320 (Recommendation 44).

46. Statement of Attorney General Edward H. Levi, Justice Department Press Release, March 10, 1976. It should be noted that while the Attorney General removed preventive action sections from the Guidelines issued by the Department, his press release appears to authorize them on an "informal basis." He states: "There also may be situations of great human peril in which the FBI might seek to take steps to prevent enormous violence from taking place. In such situations, the FBI would undoubtedly go to the Attorney General for permission to take such affirmative steps rather than to wait passively for the disaster to occur." To avoid misinterpretation, Congress should enact the Recommendations of the Senate Select Committee that would ban COINTELPRO-type activities. See Senate Final Report, note 6 supra, p. 317 (Recommendations 40-41).

47. See "The Development of FBI Domestic Intelligence Investigations", a supplementary report issued by the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate (May 1, 1976).

been trained to believe that all dissenters are enemies of the people and are therefore subject to wholesale investigation.[47] How can guidelines be expected to re-educate a bureaucracy so ingrained with this attitude? Director Hoover may be gone, but the agents who initiated the investigations and who carried out systematic programs of criminal activities remain. It is not a bureaucracy that will be checked by intelligence guidelines. For example:

- When Roosevelt issued his directives in 1939, they did not authorize the Bureau to investigate subversives. Still, the Bureau interpreted them in that manner.[48]
- When the "Manual of Instruction" was revised in 1973 to require a criminal statute as a predicate for investigation, the FBI simply cited the speech crime statutes of the U.S. Code, and interpreted them to allow investigations of political advocacy and associational activity, which the courts refuse to punish.[49]
- Although the Manual, like the guidelines, distinguishes between preliminary and full scale investigations, Bureau agents make no distinction, and employ the same investigative techniques in both.[50]
- Although the Manual also calls for the termination of investigations within 90 days, the Bureau extends investigations on a routine basis, and continues to insert new information in "dead files."[51]
- While the Justice Department and Congress try to write intelligence guidelines to restrict the FBI to investigations to anticipating violence, the current Director resists such restriction. He states, in a memorandum to the GAO, that

limiting domestic intelligence investigations to preventing force and violence could restrict the gathering of intelligence information useful for anticipating threats to national security of a more subtle nature. This is the case because, in my view, such a limitation would undermine our institutions during their preliminary stages of organization and preparation and thus inhibit the development of an intelligence collage upon which to base meaningful analyses and predictions as to future threats to the stability of our society.[52]

If the limitations on intelligence activities imposed by guidelines have not worked to date, why should they be expected to work now? Those who argue that guidelines are workable rely on oversight as enforcement. But can Congress or the Justice Department or both oversee the thousands of investigations undertaken each year? Can they hold the Bureau accountable if the standards for investigation are as vague and flexible as those proposed in the guidelines? Is Congress, with its capacity to create a HUAC as well as an Intelligence Oversight Committee, a better guarantor of Bureau propriety? And will the Justice Department or the FBI administrators now act as a restraining influence on agents, when the facts indicate that they have often been the ones urging the agents to intensify their intelligence activities to meet the "crisis" of the moment? It is improbable. Although oversight is necessary and, in certain circumstances, can be an effective means to control the FBI and other investigative agencies, oversight can never be relied on in the absence of a Charter which explicitly states the limits of FBI activity.

A Legislated FBI Charter

It is time to draw the line and call a halt to unnecessary intelligence activities. It is time to enact a Charter that:

(1) defines the FBI's mission as investigating, upon reasonable cause, the commission of crimes within the United States;

(2) repeals 18 U.S.C. 2383 (Rebellion and Insurrection); 18 U.S.C. 2384 (Seditious Conspiracy); 18 U.S.C. 2385 (Advocating the Overthrow of the Government); and 18 U.S.C. 2386 (Voorhis Act);

(3) limits the collection (and dissemination) of information to that relevant to criminal investigation and prosecution;

(4) provides for the destruction of irrelevant information and insures that files will be sealed once an investigation is terminated;

(5) prohibits COINTELPRO-type activities;

(6) prohibits the FBI from encouraging, assisting, or directing state and local police agencies in doing any investigative work for the FBI which the FBI itself is not entitled to do, except criminal investigations within their state jurisdiction;

(7) and provides criminal penalties for the violation of any provision of the Charter, and assures civil redress for the victims of such violations.

The purpose of the Charter is to define the proper role of the FBI in our free society. That role was best articulated by Harlan Fiske Stone in 1924:

The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty. . . .

These recommendations would reestablish the concepts which had been assumed when the FBI was initially established and should be adopted in legislation. A legislative Charter for the FBI is essential in a society based on the rule of law and committed to the belief that officials as well as private citizens must obey the law. □

48. GAO Report, note 18 supra, Appendix IV.
49. GAO Report, note 18 supra, pp. 28-31.
50. GAO Report, note 18 supra, p. 111.
51. GAO Report, note 18 supra, pp. 111-116 and 121.
52. GAO Report, note 18 supra, p. 213.

Protecting First Amendment Rights in FBI Criminal Investigations

MORTON H. HALPERIN*

No more urgent task faces the Congress than to enact legislation firmly bringing the FBI under the rule of law and the mandates of the Constitution. There seems to be broad agreement on the need for a legislated Charter for the FBI.

Jerry Berman's article has presented a persuasive argument for abolishing all domestic intelligence investigations. All persons in the United States have the right to be left alone free of governmental surveillance unless they have broken a criminal law enacted by the Congress. Investigations of lawful political activities have no place in a free society.

Saying this and enacting it into law is important — but not sufficient in itself. Even with a Charter limiting FBI functions to the investigation of crimes, there remains the danger that the zeal to investigate and to manipulate the political process will find other channels and encroach on First Amendment freedoms.

For the past several years, for example, the FBI has predicated all of its intelligence investigations on possible violations of the criminal law. It has, nevertheless, conducted extensive investigations based on the mere possibility that the ideas of an organization or an individual may lead ultimately to criminal activity. New legislation must be passed which would not only limit the FBI to investigating crimes but would, as the Senate Intelligence Committee recommends, limit investigations to situations in which there is "reasonable suspicion" that a crime has been or is about to be committed.[1]

A second aspect of the problem of uncontrolled FBI intelligence investigations arises from the criminal statutes which appear on their face to punish mere advocacy, in violation of the First Amendment. Such statutes, including the Smith Act (18 U.S.C. 2385) and the Voorhis Act (18 U.S.C. 2386), should be repealed to ensure that they are not used as a pretext by the FBI to continue domestic intelligence investigations under the guise of collecting criminal evidence.

There is a third problem which would persist even if the FBI were limited to investigating crimes. It is a more serious problem and one to which the remainder of this article is directed.

Normally, the investigation of a violation of a constitutional criminal statute is limited only by the Fourth Amendment and by whatever constraints Congress chooses to place on federal investigative agencies. However, an additional and much more restrictive set of restraints must come into play if the investigations may intrude upon areas of activity protected by the First Amendment. The Supreme Court has in the past and again recently mandated additional constraints when First Amendment rights are at stake.[2]

Justice Powell, writing for a unanimous Supreme Court holding that domestic intelligence wiretaps without a warrant are unconstitutional,[3] expressed the reasons why there is a need for special vigilance when the First as well as the Fourth Amendment values are involved.

The First Amendment, of course, guarantees freedom of speech, of the press, of assembly, and of the right to petition for a redress of grievances. The Supreme Court has observed that the effective exercise of these rights often requires secrecy — people must be able to gather together in private to discuss their political beliefs and to consider what lawful actions they propose to take in support of those beliefs.

The right of secret political association was firmly established by the Supreme Court in repelling the effort of the government of Georgia to compel disclosure by the NAACP of its membership lists, *NAACP v. Alabama*, 357 U.S. 449 (1958). And this right has been sustained and emphasized most

*This article is drawn closely from Mr. Halperin's testimony on May 13, 1976 before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.

1. The Committee takes the phrase "reasonable suspicion" and its definition from the Supreme Court decision in *Terry v. Ohio*, 392 U.S. 1 (1968). The phrase means "specific and articulable facts, which, taken together with rational inferences from those facts, give rise to a reasonable suspicion that specified activity has occurred, is occurring or is about to occur."

2. This distinction was most recently reaffirmed in April of 1976 in a decision upholding a subpeona for bank records. Writing for the Court, Justice Powell noted that "[P]etitioner does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley v. Valeo*, __ U.S. __ (1976), slip. op., at 54-74, nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1955)." *United States v. Miller*, __ U.S. ____ (1976), slip. op., at 9 n. 6.

3. *U.S. v. U.S. District Court (Keith)*, 407 U.S. 297 (1972).

recently by the Court in its decision striking down many of the provisions of the Campaign Reform Act. *Buckley v. Valeo*, __ U.S. __ (1976). Even in the face of a compelling requirement to end corruption in presidential election campaigns, the Court emphasized the need to protect the secrecy of political association, particularly where disclosure could lead to harassment.[4]

If the First Amendment prevents the states and the federal government from compelling the disclosure of information related to lawful political activity, it must also restrain the use of covert intelligence techniques to ferret out such information. The First Amendment is in no less measure violated if the FBI obtains a copy of the membership list of the Socialist Workers Party by surreptitious entry, theft, or the use of informers or a grand jury subpoena, than if the Party is compelled to release the list by a campaign reform law. In the latter case, the Party at least knows what is happening and can go into court to protect its rights; but in the former case, it often can not know that its rights have been violated.

All of this suggests the need for special restrictions and additional administrative and approval procedures as safeguards where a bona fide criminal investigation might intrude on First Amendment rights. The principles which must apply in such situations are as follows:

- There may be no investigation of lawful political activity.
- Any investigation which might intrude into a First Amendment area must be based on a compelling state interest.
- All investigations must be carefully controlled so as to involve the minimum possible intrusion into areas where First Amendment rights might be violated.
- No group or individual may be singled out for investigation of violation of a criminal law because of its political beliefs or activities.[5]

If these principles are accepted, there are two very difficult problems for the legislative draftsman and administrative-order writer. The first is to develop usable and effective criteria for determining when the special procedures required by the First Amendment are to come into play. The second is to specify precisely what those procedures should be. These are complicated matters which can only be worked out in close collaboration with those familiar with the procedures of the FBI. It is worthwhile, however, to offer a few tentative ideas.

There are some situations which should automatically trigger the special procedures required in investigations where First Amendment issues are involved. These include:

- Any investigation which is likely to yield information about a party running candidates for election.
- Any investigation of a candidate for elective office.
- Any investigation which is likely to yield information about an organization which exercises First Amendment rights, e.g., by lobbying for legislation, supporting political candidates, or taking stands on public issues.
- Any investigation in which information about the political views or lawful political activities of one or more individuals is to be sought or obtained.
- Any investigation of a crime in which one or more elements of the alleged offense involves political beliefs or intentions.

In applying both these specific categories (and perhaps others) and the more general rule of determining whether any First Amendment rights are involved, there should be a presumption in favor of invoking the tighter procedures. One way to do this would be to require that any doubts be resolved by referring the issue to a higher authority. For example, decisions to open or expand an investigation that might otherwise be made in the field should be sent to FBI headquarters if there is any doubt about whether the special First Amendment procedures should apply. Any doubts among the FBI administrators should be resolved by applying the stricter standards or referring the matter to the Attorney General.

The special standards to be applied should include a more careful review of the necessity of the investigation, a determination from outside the FBI that a "selective investigation" is not being proposed, and tailoring investigative techniques so that there is minimum intrusion into the area of possible First Amendment activity. Special restrictions should be put on various investigative techniques.

The use of informers who pose as members of political parties or associations raises, in my view, very special First Amendment problems. An informant who pretends to be a member of a political group cannot simply gather information. To maintain cover, he or she must participate actively in the decision-making process of the organization, take stands on issues, and try to influence the positions the organization takes and the actions it engages in. Wholly apart from any use of informants in COINTELPRO-type efforts to manipulate and sow dissent, there is an improper interference by the state in lawful political association. The right of free association is a mockery when FBI informants participate in private organizations posing

4. *Buckley v. Valeo*, __ U.S. __ (1976) see in particular the opinion of Chief Justice Burger concurring in part and dissenting in part.

5. The courts have held that selective prosecution based on political beliefs or other constitutionally suspect criteria will not be tolerated. It seems equally clear that "selective investigations" based on such grounds should be prohibited.

as *bona fide* members of the organization and influencing its decisions.

Congress should ban the use of informants who pretend to be members of political organizations. It should also require a judicial warrant for the use of any informant in investigations with First Amendment implications.

The lengthy record of FBI abuses of its power to conduct intelligence investigations, including its ability to make use of selective criminal investigations as a pretext for surveilling and harassing legitimate political activities, now calls for reforms which will safeguard the First Amendment. It is essential that legislation be enacted which will determine that as 1984 approaches we move further away from an omnipresent big brother, and that the political vitality of the Bill of Rights not be sacrificed to a system of loopholes which once again might allow expansion into a new version of COINTELPRO. □

In The Courts

(continued from page 2)

May 5, 1976 *Berlin Democratic Club v. Rumsfeld*, Civil Action No. 310-74 (D.D.C.). In an affidavit filed in an American Civil Liberties Union suit (see *First Principles*, April 1976) relating to military surveillance of American citizens in Germany, the Secretary of the Army Martin Hoffmann disclosed that the mail and telephone calls of Americans are still monitored by the U.S. Army in Berlin; Hoffmann asserted a formal claim of privilege against confirming or denying whether the plaintiffs in the case had been subject to surveillance.

May 10, 1976 *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (S.D.N.Y.). In response to a discovery order granted by Federal District Judge Thomas P. Griesa, the Socialist Workers Party has obtained hundreds of pages of FBI files related to the bureau's attempts to disrupt operations of the Party. Although most of the documents had been censored by the bureau, the names of FBI agents appeared in bureau reports referring to the burglaries and have been added to the list of defendants in the suit. (*New York Times*, 5/11/76 p. 13)

May 10, 1976 *Smith v. Nixon*, Civ. No. 76-0798 (D.D.C.). Hendrick Smith, deputy national editor of the *New York Times*, filed suit against Nixon and other past and present government officials for placing a "national security" wiretap on his home telephone while he was diplomatic correspondent for the *Times* in 1969; Smith seeks an injunction against further wiretaps, a declaration that the wiretap was unconstitutional and in violation of the United States Code, and an award of money damages to cover the expenses of the suit and which thereafter will be donated to further the cause of a free press." The telephone surveillance was begun after the *Times* published articles under Smith's byline concerning what the Nixon Administration considered to be sensitive material.

May 10, 1976 *Military Audit Project v. Bush*, Civ. No. 75-2013 (D.D.C.) memorandum and order. Following the government's refusal to publicly justify claimed exemptions in the release of the contracts and other financial records relating to the CIA's Glomar Explorer project, Judge Gerhard Gesell "reluctantly" ordered an *in camera* inspection of the documents in question. The judge ordered the government to show *"in detail, the specific basis or bases upon which potential harm to national security may result from disclosure."*

May 12, 1976 *Lane v. U.S. Secret Service*, Civil Action No. 76-0227 (D.D.C.). Following an FOIA suit filed by the American Civil Liberties Union on behalf of Mark Lane, the Secret Service agreed to release all of its files on the Kennedy Assassination. According to the first documents made available, the Secret Service had one million names in its index file of potential threats to Presidents at the time President Kennedy was assassinated, November 22, 1963. (*New York Times*, 5/13/76, p. 10)

May 18, 1976 *Kipperman v. McCone*, Civil Action No. C-75-1211-CBR (D.D.C.). Government filed a motion to vacate a summary judgment granted on April 27 in an action for damages under a CIA mail opening program because the CIA had asserted that the plaintiffs mail had not been intercepted. The government has now indicated that the index it was using was not complete. (Congresswoman Abzug reports that over a million letters were not covered by the index.) Based on the incomplete index, the CIA had advised 5,864 persons who made FOIA or privacy requests that their mail has not been opened; 134 individuals that their mail had been intercepted and furnished them with 556 letters and 222 mail covers. The ACLU class action for CIA mail opening (*Driver v. Helms*, Civ. Action No. 75-0224 [D.R.I.]) continues.

May 17, 1976 *U.S. v. Ehrlichman*, No. 74-1822 (D.C.Cir.). In upholding the conviction of John Ehrlichman for his role in the burglary of Daniel Ellsberg's psychiatrist, the court held that, at least in the absence of specific authorization by the President or the Attorney General, *there is no authority to conduct* warrantless break-ins in the name of national security. In a concurring opinion, joined by Judge Merhige, Judge Leventhal rejected the contention of the Justice Department that in certain circumstances the President or the Attorney General can order a warrantless break-in on national security grounds. Noting that no American case has ever *"sustained the right to search a home or office without a warrant merely in the name of national security."* Judge Leventhal noted that the full protection of the Fourth Amendment has been held to apply in espionage cases including Coplon and Able.

May 20, 1976 *Florence v. Department of Defense*, Civil Action No. 75-1869 (D.D.C.) opinion and order. In an FOIA suit seeking access to DoD's Technical Abstract Bulletin Index (a listing of over 500 titles of research and development projects) Judge June L. Green ordered that each unclassified entry in the Index be made available to the plaintiff. The court held it unnecessary even to *"reach the question of whether the documents were . . . properly classified, and thus not subject to disclosure,"* because the FOIA provisions for releasing "segregable portions" overrides a (b)(1) national security claim where individual entries are unclassified. At the government's request, a temporary emergency stay was granted by the appeals court on June 1.

March 23, 1976 *Communist Party v. Dept. of Justice*, Civil Action No. 75-1770 (D.D.C.). In an FOIA suit, the government released papers related to "Operation Hoodwink," an FBI COINTELPRO operation directed at the Communist Party after complaint was filed; Court awarded attorney's fees despite government assertion that it failed to release documents only because of administrative backlog.

May 27, 1976 *Halperin v. Department of State*, Civil Action No. 75-674 (D.D.C.). Memorandum and order. In an ACLU FOIA case, the court ordered the release of deleted portions of a Secretary of State background press conference relating to SALT. The government had claimed that the material was exempt from disclosure under the (b)(1) exemption for national security information. The court held that *"the classifications were not made in accordance with the procedural and substantive criteria expressed in the Executive Order and hence cannot provide the basis for the (b)(1) exemption as claimed."* The court also granted plaintiff's costs incurred in the litigation.

June 4, 1976 *Halperin v. Colby*, Civil Action No. 75-696 (D.D.C.). Memorandum and order. Concluding that the "'Secret' classification applied to the CIA budget and expenditure files is proper both procedurally and substantively," District Judge John Lewis Smith denied an FOIA request for such documents on exemption (b)(1) grounds. Agreeing with former Director Colby's view that release of the figures *"would enable [foreign] governments to refine their estimates of the activities of a major component of the United States intelligence community,"* and noting that Congress has never required publication of intelligence agencies' budgets, the judge held that *"the unauthorized disclosure of such information could reasonably be expected to cause serious damage to national security. . . ."*

then the bills automatically move to the floor.

For several years at least, the Senate Intelligence Committee must view its primary mission as developing legislation rather than conducting oversight. The legislative agenda proposed by the Church Committee report is long and difficult — and urgent. Congress has yet to enact a single piece of legislation in response to the Watergate and intelligence scandals (except for the campaign finance bill) and, as the Church Committee report makes clear, Executive Orders are no substitute for laws.

Perhaps the place to start is with agency charters. The Church Committee proposed that each intelligence agency operate under a legislated charter, and it specified what it thought those charters should be.

In doing so, the Church Committee stopped short of the absolute prohibitions recommended by the ACLU and other groups, although it recognized the strong case that its own investigation has made for such prohibitions in two major areas — CIA covert operations abroad and FBI intelligence investigations at home.

The Committee report strongly condemned many of the covert operations conducted by the CIA at the direction of each of our post-war Presidents and it seriously considered recommending their abolition. In the end, only Senator Church was prepared to go that far, but a substantial majority of the committee proposed that such operations be limited to truly extraordinary situations where the nation's survival could be said to be at stake. However, it remains to be seen whether legislation can be drafted and enforced which would in fact control and limit the CIA's covert activities to such situations.

The Committee's report and accompanying staff study painstakingly described and condemned FBI intelligence investigations and operations. The Bureau has been a law unto itself, not only in conducting intrusive surveillance of lawful political dissent, but also in seeking to manipulate the political process for Mr. Hoover's own political objectives. Yet the Committee was unwilling to recommend abolition of the FBI's intelligence function. Here Sen. Phillip Hart was left to a lonely but eloquent defense, reminding us once again of how desperately he will be missed.

The committee's proposals would attempt to limit intelligence investigations drastically and to put procedural roadblocks in the way of their abuse. But the Committee's proposals are not very different from the guidelines which the Attorney General says are now in effect and which are "controlling" the investigation of the protest rally planned for Philadelphia on July 4th. The minimal effectiveness of such controls should soon be apparent.

But even if the Church Committee's recommendations are not all that one could have hoped for, they point in the right direction, and the Committee report provides both the correct agenda and the necessary information in order to take action. Senator Inouye and his colleagues now have their work cut out for them. □

Point Of View

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798

Point of View

Not Just Oversight, But Legislation

MORTON H. HALPERIN

The congressional momentum toward bringing the intelligence agencies under control was set back by the CIA's exploitation of the assassination of its Athens station chief and by the confusion surrounding the unauthorized release of the Pike Report; but in May, the publication of the long-awaited report of the Senate Select Committee on Intelligence has generated a refreshed momentum.

The report held no major surprises, but its careful research and its sheer weight carried substantial impact. And the report's basic finding was clear; the intelligence agencies have operated outside the laws of the land and the Constitution and have systematically violated the rights of Americans.

The Committee's recommendations were also clear: there is an urgent need for enacting legislation which will first specify and limit the appropriate functions of the intelligence agencies, and then set up structures to monitor and control those activities.

The first sign of the new mood was in the speed and decisiveness with which the Senate acted to set up a permanent intelligence committee and to give it the powers that it needs if it is to be effective. The last minute efforts of the Senate Barons — led by the venerable John Stennis — to gut the powers of the intelligence oversight committee were defeated by a substantial margin

The "Cannon compromise," as the revised resolution came to be called, preserved the essential features and necessary powers recommended by the Church Committee. The new committee, to be chaired by Hawaii's Daniel Inouye, has exclusive legislative and budgetary authority over the CIA and similar authority over all other intelligence activities, which it shares with existing committees, primarily Armed Services and Judiciary. The oversight committee is to be kept fully and currently informed by the intelligence agencies and to be notified in advance of significant programs, including covert operations.

All this is to the good, but in this success there lies a great danger: congressional oversight may come to be seen as a substitute for legislation changing the legal structures and activities of the intelligence agencies and the sanctions which can be brought to bear. It is not. In the best of circumstances, oversight is a chancy business, but when it must be conducted in secret and without clear guidelines to enforce, it is doomed to failure.

The most important thing about the creation of the new Senate Intelligence Committee is that it removes the veto which Senators Eastland and Stennis have had till now on bringing to the floor legislation relating to the CIA and the FBI. Under the new rules, the Armed Services and Judiciary Committees have a fixed period of time to examine bills reported by the intelligence committee, and

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